FILE COPY

MAY 1 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1647

MOBIL CHEMICAL CORPORATION, *Petitioner*

v.

DANIEL DEVERS, *Appellee*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CLEVE BACHMAN
Beaumont Savings Building
Beaumont, Texas 77701
Attorney for Petitioner

Of Counsel:

MAURICE AMMER
Mobil Chemical Corporation
P. O. Box 900
Dallas, Texas 75221

SUBJECT INDEX

	Page
OPINION	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION AND PRAYER	13
CERTIFICATE OF SERVICE	14
EXHIBIT A (Opinion of 5th Cir., 488 F.2d 258)	15
EXHIBIT B (Judgment of 5th Cir.)	21
EXHIBIT C (Order Denying Mobil Oil's Petition for Rehearing)	23

LIST OF AUTHORITIES

CASES

	Page
Adam Dante Corp. v. Sharpe, 483 S.W.2d 452 (Tex. Sup. Ct. 1972)	4
Charles L. Myers v. Dan N. Dimmerman, 427 F.2d 248 (5th Cir., 1970)	7
Dalton v. Texas Sulphur Products, Inc., 482 S.W.2d 24 (Tex. Civ. App., Amarillo, 1972, n.w.h.)	8
Dodd v. Trans-Texas Theaters, Inc., 464 S.W.2d 157 (Tex. Civ. App.—Fort Worth 1971, writ ref'd, n.r.e.)	9
Hallespska v. Callihan Interest, Inc., 371 S.W.2d 368 (Tex. Sup. Ct., 1963)	7
Marshall v. San Jacinto Building, 67 S.W.2d 372 (Tex. Civ. App.—Beaumont, 1935)	7
Massman-Johnson v. Gundolf, 484 S.W.2d 555 (Tex. Sup. Ct. 1972)	5
McKee v. Patterson, 271 S.W.2d 391 (Tex. Sup. Ct., 1954)	8
Medallion Stores, Inc. v. Eidt, 405 S.W.2d 417 (Tex. Civ. App.—Texarkana 1966, writ ref'd, n.r.e.)	9
Triangle Motors of Dallas v. Richmond, 152 Tex. 354, 258 S.W.2d 60 (1953)	10
Wesson v. Gillespie, 382 S.W.2d 921 (Tex. Sup. Ct. 1964)	12

Page

UNITED STATES STATUTES

28 U.S.C. § 1254(1) 2

TEXAS RULES OF CIVIL PROCEDURE

Rule 19(b) 13

MISCELLANEOUS

20 S.W.L.J. 1, 12 (1966) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No._____

MOBIL CHEMICAL CORPORATION, *Petitioner*

v.

DANIEL DEVERS, *Appellee*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, MOBIL CHEMICAL CORPORATION, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 13, 1973, and the denial of the Petitioner's Petition for Rehearing entered on January 16, 1974.

OPINION

The opinion of the United States Court of Appeals for the Fifth Circuit, 488 F.2d 258 (5th Cir., 1973), appears as Exhibit "A" hereto, the judgment of the Court of Appeals as Exhibit "B," and the Order denying MOBIL CHEMICAL's Petition for Rehearing appears as Exhibit "C" hereto.

JURISDICTION

The Judgment of the Court of Appeals was entered on December 13, 1973, and the Petition for Rehearing denied on January 16, 1974. This Petition for Certiorari was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether or not the Court of Appeals followed the Texas substantive law as it construes the tort duty doctrine of "open and obvious" as it applies to injuries occurring from the use of chattels.

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions involved in this appeal.

STATEMENT OF THE CASE

This is a third party claim for personal injuries sustained by DANIEL DEVERS against MOBIL CHEMICAL CORP. Appellee, hereinafter called DEVERS, was an employee of Pierose Maintenance Company, hereinafter called PIEROSE. PIEROSE had a maintenance contract with the Petitioner, hereinafter called MOBIL. While performing the duties of his job, DEVERS sustained personal injuries when he attempted to pick up the tongue of a "gas buggy" which had been furnished by MOBIL.

DEVERS' employer, PIEROSE, had a maintenance contract with MOBIL, under which MOBIL agreed to supply all of the equipment needed by PIEROSE for its maintenance obligation. One of DEVERS' jobs was to keep welding machines used by his employer supplied with gasoline. To accomplish this he employed a two-wheel trailer, called a "gas buggy." This gas buggy had

an "A-frame tongue," to which was attached a jack which was used when the tongue was raised from the ground to be hitched, trailer-fashion, to the truck which towed it.

For approximately a year prior to the date of the accident in question, the tongue jack had not functioned. DEVERS therefore was required to manually lift the tongue in order to connect it to the truck. This was done four or five times a week, and therefore more than one hundred fifty times before DEVERS suffered a back injury while lifting the tongue.

Although the precise weight of the tongue and buggy was never established (primarily because it varied as the amount of gasoline in the buggy varied), DEVERS testified that he knew it was "heavy." DEVERS contends that MOBIL knew of this defective condition in the buggy, but such knowledge was categorically denied by MOBIL, and the buggy had not been repaired at the time of the accident. DEVERS contended MOBIL was negligent in not repairing or furnishing him a new jack.

Trial was to a jury who could not agree and the matter was submitted to the Court for decision. The District Court held for the Plaintiff, and awarded damages. MOBIL appealed and the Fifth Circuit affirmed the District Court's judgment (Exhibit "A").

At all stages the Petitioner (MOBIL) took the position that there was no liability because as a matter of law the danger, or condition, which caused the Plaintiff's injury, was an "open and obvious" one, as that concept is recognized by the decisions of the Texas courts.

REASONS FOR GRANTING THE WRIT

MOBIL's reason for asking the granting of this writ is that the decision in this case by the Circuit Court is

fundamentally in conflict with the applicable state law as to what constitutes an "open and obvious" condition. The question is important because it concerns a federal interpretation of a basic Texas concept of substantive tort law which the Texas courts constantly are applying and which the federal courts are frequently called to pass upon.

MOBIL contends that the legal concept of "open and obvious" as applied by the Texas courts negates MOBIL's liability in this case. Texas has consistently held that where a danger on the premises is an "open and obvious" one, the landowner owes *no duty* to the invitee. This is known as the "open and obvious" or "no duty" concept. This rule of law is applied both in terms of a duty of a landowner to a person who goes on his premises, and to a bailor of a chattel supplied for the mutual benefit of the bailor and the bailee. Such concept is recognized by the Court of Appeals (p. 259).

The case of *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452 (Tex. Sup. Ct., 1972), contains an excellent discussion of the application of "open and obvious" doctrine. Speaking of a condition as being "open and obvious," the Court says:

> "The term has correctly been used to mean that the proof shows the condition was so patent as to charge the plaintiff as a matter of law with knowledge and appreciation of the danger. *In this sense, there is no issue of fact.*"

With respect to the question of burden of proof, the Court said of Ms. Sharp, the plaintiff, she:

> "Must make prima facie proof that she did not know of and did not appreciate the danger and that she was not charged in law with knowledge and appreciation of the danger."

In *Massman-Johnson v. Gundolf,* 484 S.W.2d 555 (Tex. Sup. Ct., 1972), the Court stated:

> "The phrase 'open and obvious' is often incorrectly used in such a manner as to suggest that it concerns a separate concept or issue. Its correct use means that there is no dispute in the evidence concerning the facts which charge him with the knowledge and full appreciation of the nature and extent of the danger, and that these two facts are established as a matter of law . . . it should not be submitted as a special issue."

MOBIL asserts that this is a classic case involving the "no duty" concept. The condition or situation which caused or brought about DEVERS' injury occurred at least a year before he actually sustained his injury. He was fully aware of it at all times and at all times recognized the condition as one creating an obvious possibility of injury. Concerning this possibility, Mr. Devers testified:

"Q. You didn't know that you were going to hurt your back, is that right?
A. Right.
Q. But it was obviously always a possibility, wasn't it?
A. Yes, sir.
Q. And you knew from the very first, is that right?
A. Any time you lift anything you can hurt your back."

Mr. Devers also testified:

"Q. In other words it was broken one morning when you came to work?
A. Yes, sir.
Q. O.K. What was the jack for, why do you have a jack in the tongue of that thing?

A. To pick up the tongue and hook it up to the truck.
Q. Well, why do you need a jack or why do you have to have a jack to start with?
A. It was heavy.
Q. In other words, it is to heavy for a person to lift?
A. No, sir, a man can lift it but it was heavy.
Q. What is the danger of lifting it if you don't have a jack?
A. Well, it had a jack.
Q. I understand that, but the jack broke and then for a year you didn't have a jack. My question is, what is the danger or the hazard in lifting it if you don't have a jack?
A. Well, I don't know. There was no danger, it just—
Q. Excuse me.
A. It was there to lift the trailer with and it was heavy and it was more convenient for us.
Q. All right. My question is, what was the danger if you don't have a jack or the hazard in it?
A. I suppose straining your back.
Q. All right. How many times a week did you lift that jack? I mean lift the tongue of the gas buggy?
A. Well, almost every morning."

From the foregoing testimony it is clear that DEVERS knew of the obvious danger in lifting a "heavy" object. To say that he did not know of the possibility that he could injure his back negates his own testimony and all common sense.

Since this danger was open and obvious, MOBIL owed no duty to DEVERS to warn or provide against danger of lifting. If MOBIL owed no duty to DEVERS, then liability cannot be visited upon MOBIL for DEVERS' injury.

In the recent case of *Charles L. Myers v. Dan N. Dimmerman,* 427 F.2d 248 (5th Cir., 1970), the Fifth Circuit addressed itself to the application of this doctrine in Texas. Specifically referring to the concept of "no duty," or the "open and obvious" rule, the Court stated:

"NO DUTY

> "Texas requires the occupier of the premises to keep them in reasonably safe condition for his invitee . . . However, this duty does not extend to defects which constitute 'open and obvious' dangers—hence the 'no duty' principle.
>
> "This exception rests on the proposition that there could be no obligation to warn a person of something he already knows or of a danger so apparent that he will be charged with knowledge as a matter of law. In the 'no duty' situation, as in *volenti,* knowledge, either actual or charged in law, is crucial. But, there is one distinction between the doctrines which must be noted: The proof of "no duty" is not a burden of the defense. Here the burden is on the plaintiff."

The leading early Texas case applying the strict "no duty" concept was *Marshall v. San Jacinto Building,* 67 S.W.2d 372, (Tex. Civ. App.—Beaumont, 1935). There the plaintiff tripped over a rise in the sidewalk at the entrance of the building. He had used the entrance many times, but testified he did not notice the rise at the time. The court held that the condition was "open and obvious," and as a matter of law the building owners "owed no duty" to the plaintiff.

In the case of *Hallespska v. Callihan Interest, Inc.,* 371 S.W.2d 368 (Tex. Sup. Ct., 1963), the Court stated:

> "The *Adair* case may be said to stand for the proposition that when a condition is patently open and obvious and the danger apparent, and when the plaintiff has encountered it many times, he will be charged in law with knowledge and appreciation and the occupier owes him no duty."

In *Dalton v. Texas Sulphur Products, Inc.*, 482 S.W.2d 24 (Tex. Civ. App., Amarillo, 1972, n.w.h.), the plaintiff, an invitee on the premises, put a metal pole in the air which came in contact with electric wires. The defendants contended the condition was open and obvious as a matter of law. The evidence revealed that the plaintiff had been on the premises many times, and he was aware of the existing situation, and inferentially of the dangers of a metal pole contacting an electric line. The court stated:

> "When a condition is patently open and obvious and the danger apparent, and when the plaintiff has encountered it many times, he will be charged in law with knowledge and appreciation of the danger and the occupier owes him no duty."

In *McKee v. Patterson*, 271 S.W.2d 391 (Tex. Sup. Ct., 1954), the plaintiff had previously complained to his foreman about being required to work on a slick floor. After approximately two weeks of work, he ascended a ladder, and when the ladder slipped to the floor, fell and received personal injuries. The court held that, as a matter of law, the plaintiff had knowledge and appreciation of the danger of continuing to work on a slick floor, and consequently, the occupier (the owner of the ladder) owed the plaintiff no duty.

That case is particularly apropo, in that it, as in the present case, involved a piece of equipment, and in it, as in the present case, the plaintiff had used this equipment

for an extended period of time, and in it, as in the present case, the plaintiff had complained of the dangerous condition. Further, in the *McKee* case, there was testimony that the plaintiff "knew of the slickened condition of the floor," and "that a man would know that a ladder was likely to slip on the finished floor." In our case, there is also an admission by the plaintiff that there was always an obvious possibility that the lifting of a heavy trailer could cause injury.

In *Dodd v. Trans-Texas Theaters, Inc.*, 464 S.W.2d 157 (Tex. Civ. App.—Fort Worth, 1971, writ ref'd, n.r.e.), the plaintiff stepped from a restroom in a powder room area and fell. The plaintiff described the property or the premises quite accurately and the question was therefore whether the condition was an open and obvious one. The court suggested that regardless of the architect who designed the area, i.e., whether the design was negligent, the plaintiff knew or should have known of the condition and appreciated the danger of "falling." The court states:

> "This, in our opinion, is a 'no duty' case since the appellant (plaintiff) was fully aware of the precise condition of which she complains."

In *Medallion Stores, Inc. v. Eidt*, 405 S.W.2d 417 (Tex. Civ. App.—Texarkana, 1966, writ ref'd, n.r.e.), a display in a store apparently caused the customer to fall. The court suggested:

> "Even if it be assumed that there was something dangerous about the platform without display objects upon it and that the appellant knew or should have known of such danger, if any, it is our view that under the undisputed facts of this case, the platform without display of objects upon it, that any possible

> dangers were open, obvious, in plain sight, and clearly perceptible and obvious."

Here, by his own admission, DEVERS testified that he knew of the danger of straining his back, and this was exactly the danger which caused the instant injury.

The Circuit Court of Appeals categorically stated here that: ". . . the danger here was not so apparent," apparently drawing its conclusion from its interpretation of what it conceives to be the applicable Texas law in this instance, citing the case of *Triangle Motors of Dallas v. Richmond,* 152 Tex. 354, 258 S.W.2d 60 (1953), (p. 26). That case is clearly distinguishable from the present fact situation. There the plaintiff was injured as he bent out over an elevator shaft in order to convey some instruction to his helper below, and was hit by a descending elevator. The evidence indicated this was a *first exposure* to this danger in that at all times during which the plaintiff was exposed to the elevator it would not work while the door in front of the elevator shaft was open and that on this particular occasion such door was propped open. In the situation at hand, DEVERS knew of the danger and had encountered it at least 150 times before his injury.

Judge Greenhill, now Chief Justice of the Supreme Court of Texas, in an article in 20 S.W.L.J. 1, 12 (1966), puts considerable stock in the fact of the *number of exposures* as demonstrating Plaintiff's knowledge and appreciation of the danger as a matter of law. There he says and we quote:

> "The number of times a plaintiff has encountered a risk has made a difference.
>
> In *Hausman Packing Co. v. Badwey,* writ refused, the plaintiff-purchaser slipped on a slick floor of de-

fendant's refrigerated meat truck. The Court said that as a matter of law the floor's condition was open and obvious and that an invitee assumes all normal and ordinary risks including a danger which is open and obvious and should be observed 'in the exercise of ordinary care.' The court observed that the plaintiff, as a customer, had been climbing in and out of the truck for six weeks and had had *ample opportunity* to observe the condition of the floor. He was charged with knowledge of its condition.

In *A. C. Burton Co. v. Stasny,* the plaintiff on leaving a store walked through a glass window next to the door. He had had one exposure previously. He walked through the door by the glass on entering the store. He admitted seeing the glass on the way in, but said he just forgot about it on the way out. The jury found that the plaintiff did not know there was a glass window there, and that he was not contributorily negligent. Nevertheless the Court said presence of the glass was open and obvious 'and should have been observed in the exercise of ordinary care.' Plaintiff was thus charged with knowledge of it on his *second exposure.*

In *Houston National Bank v. Adair,* the plaintiff had been many times upon the bank's worn stairs. I have some difficulty with the Court's logic in *Adair. The opinion first says that the condition was open and obvious to any reasonable person.* If that were so, it might be argued that the number of exposures was immaterial. But the Court goes on to say that the plaintiff had been on the *stairs many times. So she knew as much about the condition as the employer,*—and this notwithstanding her own testimony that she had never noticed, until she was falling, that the stairs were slick. Then there is a paragraph that says that even if it be assumed that the stairs were not properly lighted and that there was no supporting handrail, these facts (including the fact that

the stairs were not properly lighted) were also open and obvious to the plaintiff.

In any event, the emphasis in *Adair* is on the fact that *plaintiff had been over the defective stairs many times.*" (Emphasis ours).

One of the leading cases and close in point of fact to the one at bar is *Wesson v. Gillespie,* 382 S.W.2d 921 (Tex. Sup. Ct. 1964). This is generally referred to as the "8-Ball Case." Briefly, Plaintiff contended that she sustained injury when she stumbled over a threshold in the doorway of the 8-Ball Club. In that case, the Court said and we quote:

". . . The plaintiff had been, by her admission, across the same threshold an astronomical number of times; *at least 500*. She tripped on her fourth exposure that same night, going out of (not coming into) the tavern. The jury found that the owner did not fail to properly illuminate the threshold. The condition was static and part of the permanent construction. It was so situated that unquestionably she had stepped on it, or deliberately stepped over it, on most of her departures from the 8-Ball. In any event, while as we said in Triangle Motors that one exposure to a danger may not relieve the owner, *there must be some limit to the number of times when a person exposed to a dangerous condition will be charged with knowledge and appreciation of the danger.* If it were only a few times, we would have a different problem. *But two to five exposures a week for four or five years* under the same conditions, in our opinion, must fall within the area of charged knowledge and appreciation. We hold that it does." (Emphasis ours) p. 926.

The Court of Appeals, by reverse reasoning, here suggests that DEVERS had, without injury, lifted the buggy

numerous times, and hence did not appreciate that the weight involved was fraught with danger (pp. 260-261). However, as noted in Texas cases, numerous encounters with a known danger is a factor in support of the conclusion that the danger was open and obvious, and that the plaintiff knew of and appreciated the danger, rather than against such conclusion. According to the Court's reasoning, if a man on numerous occasions accepts rides from an intoxicated person and sustains no injury, but is finally injured because of the intoxicated person's inability to drive, it could not be said that the danger was open and obvious to the passenger, or that the passenger appreciated the danger. This reasoning seems patently erroneous, and in basic conflict with all applicable Texas authority.

From the foregoing, it is clear that the Court of Appeals' decision is in direct conflict with the applicable state law. Had this case been decided in the Texas courts, the danger would have been held to be open and obvious. Rule 19(b) does require that the state law with which the Court's decision is in conflict must be an important one. The doctrine of "open and obvious" danger is encountered numerous times in tort litigation, and is fundamental to Texas jurisprudence. Under "ERIE," the Federal Court is bound to follow the Texas law. If this opinion is not corrected, then application of the doctrine of "no duty" will be severely limited, if not abrogated. If the danger here was not open and obvious, then the use of the doctrine in Federal Courts applying the Texas law is dead.

CONCLUSION AND PRAYER

Because the Court of Appeals has by its opinion established a different criteria or test to be applied by the

Federal juridiciary, as to the substantive duty concept of "open and obvious," than that applied by the Texas courts, MOBIL prays that a Writ of Certiorari be issued to review the judgment and opinion of the Court of Appeals in this case; and that the judgment be reversed and rendered, or for such other relief as Petitioner may show itself entitled to receive.

Respectfully submitted,

CLEVE BACHMAN
Beaumont Savings Building
Beaumont, Texas 77701
Attorney for Petitioner

Of Counsel:

MAURICE AMIDEI
Mobil Oil Corporation
P. O. Box 900
Dallas, Texas 75221

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been forwarded to WOODSON E. DRYDEN, 915 Goodhue Building, Beaumont, Texas, attorney for Plaintiff-Respondent, and JAMES W. MEHAFFY, SR., San Jacinto Building, Beaumont, Texas, attorney for Argonaut Insurance Company, Intervenor, by depositing the same in the United States mail, properly addressed with postage paid, on this the 17th day of April, 1974.

CLEVE BACHMAN

EXHIBIT "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1547.

DANIEL DEVERS, Plaintiff-Appellee,

v.

MOBIL CHEMICAL CORPORATION,
Defendant-Appellant,

ARGONAUT INSURANCE COMPANY,
Intervenor-Appellee.

Dec. 13, 1973.

Rehearing Denied Jan. 16, 1974.

Action was brought by an employee of maintenance company for injuries sustained in lifting a defective gas "buggy" supplied by defendant. From a judgment of the United States District Court, Eastern District of Texas at Beaumont, Joe J. Fisher, Chief Judge, in favor of the plaintiff, the defendant appealed. The Court of Appeals, Coleman, Circuit Judge, held that the court's finding for the plaintiff was not erroneous on grounds that defective condition was so "open and obvious" that no duty was owed to him, and that the employee assumed the risk, where the employee conceded that he knew of the defective condition but did not appreciate the nature and

extent of the danger associated with the defective condition.

Affirmed.

Cleve Bachman, Beaumont, Tex., Maurice Amidei, Dallas, Tex., for defendant-appellant.

Woodson E. Dryden, Beaumont, Tex., for plaintiff-appellee.

James W. Mehaffy, Sr., Beaumont, Tex., for intervenor.

Before BELL, COLEMAN and RONEY, Circuit Judges.

COLEMAN, Circuit Judge.

This diversity personal injury action has had a turbulent career. It was first tried to a jury and the verdict was set aside. The next jury could not agree on a verdict. The parties then agreed to submit the case to the District Judge on the record compiled in the second trial. He filed findings of fact and conclusions of law, awarding damages in the sum of $50,000. Mobil Chemical Corporation appeals. We affirm.

The Plaintiff-Appellee, Devers, was an employee of Pierose Maintenance Company, which had a maintenance contract with Mobil Chemical Corporation. Under this agreement, Mobil supplied all the equipment needed by Pierose for its maintenance duties. One of Devers' jobs was to keep equipment filled with gasoline. To accomplish this he was required to use a two wheeled trailer, called a gas "buggy". This gas buggy had an "A-frame tongue", to which was attached a jack for use when the tongue was raised from the ground to be hitched, trailer fashion, to the truck which towed it.

For about a year prior to the accident in which Devers was hurt, the tongue jack had not functioned, so he had manually lifted the tongue in order to connect it to the truck. This was done four or five times a week, more than 150 times before Devers suffered a serious back injury while lifting the tongue. The actual weight of the tongue and buggy was never established. It varied because the weight was less when full; at such times the liquid was balanced and would not "run to the front". In any event, Devers testified that it was heavy, although prior to the injury neither he nor his partner experienced any trouble lifting it.

It appears that Devers had notified Mobil of the defective condition of the jack, but it was never repaired.

Mobil contends, nevertheless, that because of Devers' repeated exposure to the defective condition that it was so "open and obvious" that no duty was owed to him; moreover, that Devers voluntarily assumed the risk *(volenti non fit injuria)*. It is accordingly argued that a finding for the plaintiff was erroneous as a matter of law.

[1] While this case involves the supply of a chattel for mutual benefit, we are controlled by the same rules of law which govern the duty of a landowner to his invitees, Ellis v. Moore, 401 S.W.2d 789, 794 (Tex., 1966); Roosth & Genecov Production Co. v. White, 152 Tex. 619, 262 S.W.2d 99 (1953).

The Texas Supreme Court in Adam Dante Corp. v. Sharpe, 483 S.W.2d 452, 455-458 (Tex., 1972), has recently said of the two principles in issue:

> "Under such issues (open and obvious) it would be Mrs. Sharpe's (plaintiff) burden at trial to prove

> the existence and violation of a legal duty owed to her by Adam Dante. * * * That includes her burden to prove that she did not possess actual knowledge of the danger, that she did not fully appreciate the nature and extent of the danger, and that the danger complained of was not so open and obvious as to charge her, as a matter of law, with such knowledge and appreciation." [At p. 455]
>
> "*Volenti non fit injuria* was Adam Dante's second pleaded defense. The thrust of the defense is actual knowledge by Mrs. Sharpe of the specific dangers, which, with full appreciation, she voluntarily encountered." [At p. 456]
>
> "The fourth area of confusion arises out of the overlap of the so-called no-duty issues and the volenti issues. We recognized this situation in McKee v. Patterson, 153 Tex. 517, 271 S.W.2d 391 (1954), where we said, 'Actually, in their application to a given fact situation the two theories so completely overlap as to be almost indistinguishable.' A plaintiff's failure to overcome the no-duty issues and a defendant's proof of the volenti issues both go toward the same goal." [At pp. 457-458]

[2, 3] It is evident from the above that while the plaintiff has the burden in the no-duty issue and the defendant the burden in the *volenti* defense, knowledge and appreciation of the danger, either actual or chargeable as a matter of law, are essential ingredients of both principles. The question, then, is whether Appellee had knowledge and appreciation of the danger involved. This is a subjective determination, and not whether Devers "should have known" of the danger, Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368 (Tex., 1963).

The Appellant urges that since the Appellee admitted the gas buggy was heavy and that lifting heavy objects

might strain his back, he, as a matter of law, should be charged with knowledge and appreciation of the danger. Appellee argues that the proper interpretation of the law is that he must have appreciated the nature and extent of the injury which might result from the defective condition.

[4] While Devers' interpretation of Texas law is not completely foreclosed by the cases, it would most certainly be an expansion of established principles. It is not our function to expand the law of Texas. Rather, we must apply the interpretation which most likely would be applied by the Texas court of last resort. In this effort, due to his experience and familiarity with Texas law, precedent directs us to extend great deference to the Trial Judge's understanding of it, Harris v. Hercules, 8 Cir., 1972, 455 F.2d 267.

[5] It is not altogether clear from the Judge's findings of fact and conclusions of law just which standard he used —"nature and extent of *danger*" or "nature and extent of *injury*". If the "nature and extent of injury" standard was used, then the Judgment is clearly due to be affirmed. We, however, do not have to decide that point for we conclude that an affirmance is warranted even under the Appellant's "nature and extent of danger" standard.

Mobil cites many "slip and fall" cases,[1] but they are of no help because in the instant case the Appellee never alleged that he did not know of the defective condition but alleges, instead, that he did not appreciate the nature and extent of the danger associated with the defective

1. *E. g.*, Collins v. Singer Sewing Machine Co., 239 F.2d 705 (5 Cir., 1957); Wesson v. Gillespie, 382 S.W.2d 921 (Tex., 1964); McKee v. Patterson, 271 S.W.2d 391 (Tex., 1954).

condition. Appellant relies on cases where the danger associated with the defective condition is so apparent that the plaintiff was charged with appreciation of the nature and extent of the danger,[2] but here the danger was not so apparent. *See,* Triangle Motors of Dallas v. Richmond, 152 Tex. 354, 258 S.W.2d 60 (1953).

Appellant repeatedly points out that Devers lifted the buggy some 150 times. This would certainly charge him with the knowledge of the defective condition, but the numerous liftings without injury lend support to the view that he did not appreciate the fact that the weight involved was fraught with danger (Cf. Schiller v. Rice, 151 Tex. 116, 246 S.W.2d 607, 1952).

The determinative factor is that at the time of the injury nothing new entered the sequence of events. Therefore, the more times the Appellee lifted the tongue (buggy) without injury, the more reasonable the likelihood that he did not appreciate the nature and extent of danger, Ellis v. Moore, 401 S.W.2d 789 (Tex., 1966). This is reinforced by the fact that he lifted the object only several times a day and not repeatedly at frequent intervals, which might have raised an awareness from the related strain and stress.

The Judgment of the District Court is

Affirmed.

---

2. Rabb v. Coleman, 469 S.W.2d 384 (Tex., 1971) [combustible gas]; Greenwood v. Lowe Chemical Co., 433 S.W.2d 695 (Tex. 1968) [vat of dangerous chemicals]; Howard v. Jackson Electric Co., 430 S.W.2d 689 (Tex. Civ. App.—Waco, 1968, writ ref'd, n.r.e.) [electrical wires]; and Texas Bitulithic Co. v. Caterpillar Tractor Co., 357 S.W.2d 406 (Tex. Civ. App.—Dallas, 1962, writ ref'd, n.r.e.) [danger of tractor when uncontrollable due to jammed throttle].

EXHIBIT "B"

United States Court of Appeals

FOR THE FIFTH CIRCUIT

(Filed January 25, 1974)

October Term, 1973

No. 73-1547

D. C. Docket No. CA 7103

DANIEL DEVERS, Plaintiff-Appellee,

versus

MOBIL CHEMICAL CORPORATION,
Defendant-Appellant,

ARGONAUT INSURANCE COMPANY,
Intervenor-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

Before BELL, COLEMAN and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

December 13, 1973

Issued as Mandate: Jan. 24, 1974

EXHIBIT "C"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 73-1547

DANIEL DEVERS, Plaintiff-Appellee

versus

MOBIL CHEMICAL CORPORATION,
Defendant-Appellant,

ARGONAUT INSURANCE COMPANY,
Intervenor-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

---

ON PETITION FOR REHEARING

(Filed January 16, 1974)

Before BELL, COLEMAN and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.